No. 79-1356

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

KATHY SUE JOHNSON, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY
OF CHICAGO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS KATHY SUE JOHNSON, ET AL., AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS KATHY SUE JOHNSON, ET AL.

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This motion of the Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. Petitioners Kathy Sue Johnson, *et al.,* have consented to the filing of this brief; however, despite numerous attempts to do so, amicus has been unable to contact counsel for respondents and consent of respondents to file this brief is, therefore, deemed refused. This consent has been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of this brief.

Pacific Legal Foundation believes that this case is of great importance to all citizens of the United States. It raises questions of the permissibility of excluding students of a particular race from their integrated neighborhood school to maintain a particular racial balance in that school. Further, it questions the permissibility of classifying students according to race in a nonremedial context. In essence, the case raises the question of the rights of children, the pawns who, too often, are shuttled to and fro in order that mathematical formulae be fulfilled.

Because of the national significance of the case, Pacific Legal Foundation feels that the present parties cannot adequately represent the interests of the public while at the same time representing their own localized interests.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief amicus curiae be granted.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus curiae is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *Johnson v. Board of Education of*

the City of Chicago is reported at 604 F.2d 504 (7th Cir. 1979).

STATEMENT OF THE CASE

At issue in this case is the constitutionality of the Student Racial Stabilization Quota Plan (Racial Quota Plan) that was instituted in two public high schools, Morgan Park and Gage Park, in the City of Chicago. The Racial Quota Plan, which excludes from attendance at the two high schools a significant percentage of the black and hispanic students who live within the geographic attendance area served by the schools, was enacted by the school board in response to changes in the racial mix of the residential neighborhoods within the attendance area. Throughout the operation of the Racial Quota Plan, no white student was ever excluded from either of the schools, whether or not the students lived within the geographic attendance area served by the two schools.

The black and hispanic students who were excluded from Gage Park and Morgan Park High Schools were allowed to transfer to any one of eighteen high schools in the district with an attendance level below the district wide average of 101.3% of capacity. Only six of these "under-utilized" schools had significant white enrollments, the closest of which was 11.4 miles from Gage Park and 18.15 miles from Morgan Park. Under the original Racial Quota Plan, the school board provided the excluded black and hispanic students with "carfare" to travel to another integrated school which required:

1. riding a bus to the Dan Ryan rapid transit line;

2. riding the Dan Ryan line to either the Howard or Ravenswood lines; and

3. transfer to another bus to get to the school.

The board later modified the Racial Quota Plan to provide free bus transportation to the alternate schools. Even with this modification, however, the vast majority of the excluded black and hispanic students ultimately attended alternate schools with enrollments in excess of 99% minority students.

SUMMARY OF ARGUMENT

1. The use of racial quotas for whatever purpose impacts on the Equal Protection Clause of the Fourteenth Amendment and thus requires the state: to demonstrate a compelling governmental interest; to prove that the quota is precisely tailored to serve that interest; and to prove the absence of a less drastic alternative.

2. There is no compelling *governmental* interest in maintaining an integrated student body where the racial mix is being altered by population shifts and no governmental action is implicated.

3. The fact that the students excluded from their integrated neighborhood school by the Racial Quota Plan ended up attending segregated schools demonstrates that the interest advanced is not actually served by the quota.

ARGUMENT

I

ABSENT A COMPELLING STATE INTEREST, THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS RACIAL CLASSIFICATIONS

The Racial Quota Plan adopted by the Board of Education for Gage Park and Morgan Park High Schools classifies the students solely on the basis of their race. The Racial Quota Plan is not a remedial measure to cure the effects of state imposed segregation. Rather, the Racial Quota Plan is a program that the school board adopted on its own initiative to maintain a specified racial balance in the two schools.

This Court has consistently held racial classifications that disadvantage "discrete and insular minorities" to be inherently suspect. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). Such classifications are to be subjected to "strict scrutiny" (*Korematsu,* 323 U.S. at 216) and are valid only if use of the classification furthers a compelling state interest in a manner that is the least destructive to the rights of the class of persons disadvantaged (*Regents of the University of California v. Bakke,* 438 U.S. 265, 305 (opinion of Powell, J.), 357 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) (1978). This Racial Quota Plan that excludes significant numbers of black and hispanic students from their neighborhood schools imposed by the Board of Education of the City of Chicago utterly fails to meet this test of strict scrutiny.

A. Respondents Have Failed to Advance a Governmental Interest

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court stated, in dicta:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example. that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities. . . ." *Id.* at 16.

Amicus curiae Pacific Legal Foundation would suggest, however, that this conclusion be reexamined in light of the Equal Protection Clause of the Fourteenth Amendment. Amicus notes that this Court has, on prior occasions, struck down laws containing racial classifications even though the law applied equally to all races. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967). A policy adopted by a school board to maintain a specified racial balance in the student population will necessarily classify students on the basis of their race and, in instances such as the Racial Quota Plan here at issue, may impose the entire burden of maintaining the balance on one particular race.

While amicus realizes there is no fundamental right to attend a particular public school, we wish to emphasize that there are interests of the student and his or her parents that should be considered before excluding that student from the neighborhood school. Many factors contribute to the educational development of the nation's youth. Of these,

the school plant and its teaching staff are only one element. Other factors which must be given due consideration are the importance of the parents' place in education, parental involvement in the schools' parent-teacher programs, opportunities for extracurricular activities, adequate nutrition, and adequate exercise and rest. These factors, to a large part, are best served by a neighborhood school.

Consider, for example, the problems a parent might have in attending a Parent-Teacher Association meeting at his child's school which is located many miles from his home. In an area such as Los Angeles, where some children are bused to schools 20 miles from home, this important part of child educational development may be totally lacking. Sending children to school many miles from their homes also places an extra burden upon parents who would like to assist in daytime school activities. Parents of modest income may be altogether precluded from helping in the classroom simply because they cannot afford the costs of transportation. Taking children out of their neighborhood schools may also diminish their opportunity to participate in extracurricular activities. Where athletics, band, or other such activities are conducted outside of regular school hours, the child who has to ride the bus may be precluded from participating. These interests of the students must be weighed against the mere desire of the school board to achieve or maintain a racial balance.

The question of whether a school board has a legitimate interest in maintaining a prescribed racial balance becomes even more perplexing when considered against the factual background of this case. Gage Park and Morgan Park High Schools were racially integrated prior to the imposition

of the Racial Quota Plan. The racial quotas were imposed when the school board perceived a shift in the racial mix of the residential neighborhoods within the geographic attendance areas of the two schools. This Court has previviously held that:

> "It does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann,* 402 U.S. at 31-32 (brackets in original).

The school board in this case is unduly burdening the students by requiring them to suffer a crosstown bus trip to reap the benefits of an integrated school—benefits already available in their neighborhood school.

Finally, amicus questions the governmental interest in a racial quota plan that disadvantages a class of persons that the school desegregation cases sought to protect. *See Brown v. Board of Education of Topeka,* 347 U.S. 483, 493-94 (1954).

B. Respondents Have Failed to Show That Any Presumed Governmental Interest Is Actually Advanced By the Use of Racial Classifications

Even assuming arguendo that the school board has put forward a governmental interest considered to be compelling, this alone is insufficient to support a state action disadvantaging a class of persons solely on account of their

race. The school board must also demonstrate that the use of the racial classifications actually furthers or serves that compelling interest. *Bakke,* 438 U.S. at 305 (opinion of Powell, J.), 357 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

If this Court finds that the school board has put forward a compelling governmental interest, that interest must be a racially balanced student population in general—not merely a prescribed racial mix at only two of the 51 high schools in the district. The proffered interest clearly is not served by the Racial Quota Plan.

Further, the interest is not served if the black and hispanic students excluded from the two schools are denied the benefits of that governmental interest. The Court of Appeals for the Seventh Circuit held that the free transfer program established by the school board for the excluded black and hispanic students provided those students with a "viable opportunity" to attend an alternate integrated school. *Johnson v. Board of Education of the City of Chicago,* 604 F.2d at 518. Amicus curiae believes, however, that this conclusion was erroneous. The vast majority of the black and hispanic students excluded from their neighborhood schools ended up attending high schools with a 99% minority student population. *Id.* at 513.

It appears that the Court of Appeals overlooked the decisions of this Court that hold "free transfer" programs to be an inadequate remedy for students who have been denied benefits granted other students in the school district solely on account of the color of their skin. *See e.g., Monroe v. Board of Commissioners,* 391 U.S. 450, 457-59 (1968);

Raney v. Board of Education, 391 U.S. 443, 446 (1968); *Green v. School Board of New Kent County*, 391 U.S. 430, 441 (1968).

CONCLUSION

In concluding that the Racial Quota Plan here in question was constitutionally permissible, the Court of Appeals stated:

> "Moreover, we regard the mechanics of integration, particularly in the circumstances of voluntary remedial action, where the purpose is obviously to implement the promise of *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and effectively achieves that objective, to be ordinarily a matter within the discretion of the local school authorities." *Johnson*, 604 F.2d at 519.

The Court of Appeals has missed the point both of the Racial Quota Plan and the decision in *Brown*. The Racial Quota Plan was not imposed as a remedial measure to eliminate the vestiges of a dual school system. In fact, both Gage Park and Morgan Park High Schools were fully integrated before the plan was implemented.

The Racial Quota Plan here at issue does not represent the implementation of the promise of *Brown*. Rather, exclusion of black and hispanic students from their integrated neighborhood school and relegating them, in fact, to schools with a minority student population in excess of 99% is a perversion of both the Equal Protection Clause and the decision in *Brown*. This case is representative of the fallacy of "benign racism" and quotas in general. The granting or withholding of rights and privileges solely on the basis of

an immutable characteristic such as skin color or gender, regardless of the purpose, can have no place in a society ruled by a constitution that purports to guarantee equal treatment to all citizens.

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